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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR WOODS, Defendant and Appellant.	B165281 (Los Angeles County Super. Ct. No. BA226785)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Redburn, Judge. Modified and affirmed.

Chris R. Redburn for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Thien Huong Tran, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I. to IV.A. of the Discussion.

A jury convicted appellant and defendant Arthur Woods of second degree murder (Pen. Code,[1] § 187, subd. (a)), and found true the special allegation that he discharged a firearm (§ 12022.53, subds. (b)-(d)). Defendant was sentenced 40 years to life, with 15 years to life for murder and 25 years to life for the gun use enhancement. (§ 12022.53, subd. (d).) The remaining gun use enhancements were stayed. (§ 654.)

On appeal, defendant seeks reversal and contends the trial court erred by: 1) declining to augment a jury instruction on the burden of proof for heat of passion (CALJIC No. 8.42); 2) instructing the jury that a plea of self-defense may not be contrived (CALJIC No. 5.55); 3) admitting the tape of a 911 call; 4) admitting a post-autopsy photograph of the victim; 5) cumulatively prejudicing defendant by its instructional and evidentiary errors; 6) imposing a section 12022.53, subdivision (d), gun use enhancement; and 7) staying, rather than striking, enhancements under section 12022.53, subdivisions (b) and (c).

In the published portion of this opinion, we find merit in defendant's last contention and modify the judgment to strike the enhancements previously imposed and stayed pursuant to section 12022.53, subdivisions (b) and (c). In the unpublished portion of this opinion, we reject defendant's other contentions and affirm the judgment as modified.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant and victim Debra Woods (Woods) had a stormy marriage. They argued day after day about defendant's drinking problem. In one of their fights over his drinking, defendant pushed Woods off the front porch and jumped on her. Another time, Woods kicked defendant out of the house for three days due to his drinking. The two

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

lived with their then-one-year-old son, six-year-old daughter, and Woods's 14-year-old son, Clifton.

One early morning in January 2002, the couple's discord erupted after defendant had stayed out all night and returned home smelling of alcohol. Clifton was awakened by sounds of the couple arguing and Woods shouting at defendant to leave. In the kitchen, Clifton saw defendant hit Woods in the face with a closed fist. In response, Woods picked up a kitchen knife, waived it at the front door, and yelled at defendant to get out of the house. Woods then went to her bedroom and put the knife down by her bed.

That same morning, while defendant watched TV on the living room couch, Woods took the remote control and again asked defendant to leave, so that she could clean up the house, feed the children, and not smell the alcohol. Woods asked Clifton to hand defendant his coat and persuade him to go, but it was to no avail. Woods also pretended to telephone the police to trick defendant into leaving, but that too proved unsuccessful. Defendant only moved from the couch to the floor where he eventually fell asleep. Woods gave up and retreated to her bedroom. Clifton subsequently heard defendant go to the back door and saw him take something from a closet shelf in the storage room.

Later that day, the argument resumed outside Clifton's room. Clifton heard defendant state in a "raised" voice, "I got something for you" and "bitch." Clifton saw defendant go to the storage room and Woods run to her bedroom. Defendant returned pointing a gun at Woods. Woods ran back holding the knife pointed away from defendant. Defendant said to Clifton, "Take care of the kids." Defendant then grabbed and yanked Woods's hand, saying "come on, let's go outside." Woods refused and pulled back. Defendant then shot Woods once in the chest and she fell backwards. A deputy coroner later concluded Woods died from rapid blood loss due to a gunshot wound to the chest. The bullet pierced both lungs and the aorta. Stippling around the entry wound showed the gun was fired half an inch to 24 inches away from the body.

Immediately after the shooting, Clifton ran to two neighbors for help. He cried hysterically, "He shot my mama. He shot my mama. Help, help, help." One neighbor, Kay Marshall (Marshall), called 911 while Clifton relayed the requested information. Clifton could be heard crying in the background on the 911 call. The other neighbor, Keisha Green (Green), saw defendant close the trunk of his car, walk "nonchalantly" to the driver's side, and drive away.

That afternoon, the police took defendant into custody. Even though he smelled of alcohol, defendant exhibited no slurred speech or trouble walking. After being advised of and waiving his *Miranda* rights, defendant told police he had made faces at Woods in the kitchen. Defendant claimed Woods then slapped him in the face before he slapped her back. Defendant maintained his gun then accidentally discharged inside the bag he picked up, whereupon Woods was struck. He also said he had thrown away the gun. When told Woods had died, defendant stated, "Man, I didn't need no lawyer cause, hell, I done—you already know." At the end of the interview, defendant declared, "My life is over."

Defendant's car was found and impounded. The car's trunk contained a loaded .22 caliber pistol wrapped in a black plastic bag hidden inside a milk crate. Only one casing had been expended inside the gun's cylinder. A firearms criminalist found no malfunction that would have caused the gun to discharge accidentally without applying at least four pounds of pressure on the trigger.

At trial, defendant was acquitted of first degree murder. The jury convicted him of second degree murder (§ 187, subd. (a)) and found true the special allegations of discharging a firearm (§ 12022.53, subds. (b)-(d)). The court imposed a sentence of 40 years to life, 15 years to life for murder and 25 years to life for the gun use enhancement. (§ 12022.53, subd. (d).) It stayed the remaining gun use enhancements. (§ 654.) A $200 restitution fine (§ 1202.4, subd. (b)) and a $200 parole revocation fine were imposed, with the latter stayed. Defendant was awarded 463 days of presentence custody credits. This appeal followed.

DISCUSSION

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319*; People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.)

I. JURY INSTRUCTIONS

A. CALJIC No. 8.42

At trial, defendant requested a modification of CALJIC No. 8.42,[2] "SUDDEN QUARREL OR HEAT OF PASSION AND PROVOCATION EXPLAINED," to include instructions that "the burden is on the prosecution to establish beyond a reasonable doubt that the defendant did not act in the heat of passion." The court denied the requested modification on the grounds the instruction packet contained sufficient safeguards, in that

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[2] CALJIC No. 8.42 states: "8.42 SUDDEN QUARREL OR HEAT OF PASSION AND PROVOCATION EXPLAINED [¶] (Pen. Code, § 192, subdivision (a)) [¶] To reduce an unlawful killing from murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion. [¶] The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time. [¶] The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment. [¶] If there was provocation, [whether of short or long duration,] but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter."

other jury instructions already set forth the prosecution's obligation to establish beyond a reasonable doubt that defendant did not act in the heat of passion. On appeal, defendant argues the trial court's denial of the modification omitted an element of murder, prejudicing him and depriving him of due process.

"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.]" (*People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 750-754; *People v. Holt* (1997) 15 Cal.4th 619, 677 [instructions are not considered in isolation.].) An erroneous instruction that omits an element is subject to harmless error analysis pursuant to *Chapman v. California* (1967) 386 U.S. 18. (*People v. Prieto* (2003) 30 Cal.4th 226, 256.)

The jury was advised that the instructions were to be considered as a whole and each in the light of all the others. (CALJIC No. 1.01, "INSTRUCTIONS TO BE CONSIDERED AS A WHOLE"; *People v. Holt* (1997) 15 Cal.4th 619, 677.) Viewing the entire charge of the trial court, then, we agree it was unnecessary to modify instructions under CALJIC No. 8.42. Under CALJIC No. 8.50, "Murder and Manslaughter Distinguished," the court already gave the requested instruction on the prosecution's burden of proof regarding the heat of passion. That instruction states in pertinent part: "To establish that a killing is murder . . . and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel] [or] [in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury]." (CALJIC No. 8.50.)

The trial court additionally gave other instructions defining the prosecution's burden to prove beyond a reasonable doubt the charge of murder under CALJIC Nos. 5.15, "CHARGE OF MURDER—BURDEN OF PROOF RE JUSTIFICATION OR EXCUSE," and 8.72, "DOUBT WHETHER MURDER OR MANSLAUGHTER."

Further, the jury was instructed generally on the prosecution's burden to prove defendant guilty beyond a reasonable doubt under CALJIC No. 2.90, "PRESUMPTION OF INNOCENCE—REASONABLE DOUBT—BURDEN OF PROOF." In conjunction with these several instructions, defendant's requested amplification of CALJIC No. 8.42 would have been redundant, and was unnecessary.

B. CALJIC No. 5.55

At trial, over defendant's objection, the court instructed the jury on CALJIC No. 5.55, "PLEA OF SELF DEFENSE MAY NOT BE CONTRIVED," which states: "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." The court found sufficient evidence defendant had provoked Woods into a quarrel by initially making faces and gestures at her. On appeal, defendant argues no evidence supported the challenged jury instruction.

We agree that sufficient evidence supports the instruction. At his police interview, defendant admitted he made faces at Woods in the kitchen. His conduct provoked Woods to slap him, and he hit her back. In their later confrontation, defendant shouted "I got something for you" and "bitch" to Woods. Thereafter, defendant retrieved his gun from the closet. In response, Woods rushed back into her bedroom to arm herself with the knife she left by her bed. Although Woods' knife was pointed away from defendant, defendant aimed his gun at Woods. Defendant then grabbed and yanked Woods, insisting on settling the confrontation outside. When Woods refused, he pulled the trigger, inches from her chest. This evidence would support a jury's reasonable inference that defendant was seeking the quarrel, not responding to provocation.

Further, even assuming for the sake of argument that the trial court erred in giving these instructions, we find any error to be harmless. In addition to the instruction at issue, CALJIC No. 5.56, "SELF-DEFENSE—PARTICIPANTS IN MUTUAL COMBAT," was also given. That instruction states: "The right of self-defense is only available to a person who engages in mutual combat if [he] [she] has done all the following: [¶] 1. [He] [She] has actually tried, in good faith, to refuse to continue

fighting; [¶] 2. [He] [She] has clearly informed [his] [her] opponent that [he] [she] wants to stop fighting; [¶] 3. [He] [She] has clearly informed [his] [her] opponent that [he] [she] has stopped fighting; and [¶] 4. [He] [She] has given [his] [her] opponent the opportunity to stop fighting. [¶] After [he] [she] has done these four things, [he] [she] has the right to self-defense if [his] [her] opponent continues to fight." (CALJIC No. 5.56.) Here, defendant did not meet any of these elements; he continued fighting Woods, and neither informed her he wanted to stop fighting nor gave her an opportunity to do so. To the contrary, defendant was confrontational, physically restrained Woods, and then shot her. Thus, it was improbable that appellant could have successfully claimed self-defense or received a more favorable verdict had CALJIC No. 5.55 not been given.

II. ADMISSION OF EVIDENCE

A. 911 Call

At trial, defendant also objected to the admission of Marshall's 911 call on the grounds of hearsay and relevance. The court overruled the objection with respect to excluding the 911 call completely. Redacting those prejudicial portions impugning defendant's character, the court admitted the 911 call as a spontaneous statement/excited utterance exception to the hearsay rule under Evidence Code section 1240. Finding the 911 call relevant to corroborate Clifton's statements, the court further determined its admission would not create a substantial danger of undue prejudice, confuse the issues, or mislead the jury. On appeal, defendant contends the admission of the inflammatory 911 call deprived him of due process under the Due Process Clause and the 14th Amendment. He also asserts the tape was hearsay, irrelevant, and more prejudicial than probative.

Defendant's failure to raise his constitutional rights to due process and a fair trial in the trial court constitutes a waiver of that claim. (*People v. Catlin* (2001) 26 Cal.4th 81, 122-123, mod. 26 Cal.4th 1060c.) On his remaining claims, we review the trial court's ruling on the admissibility of the 911 call for abuse of discretion. (*Id*. at p. 120.)

An out-of-court statement constitutes hearsay evidence only when it "is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a); *People v. Anthony*

O. (1992) 5 Cal.App.4th 428, 432.) Here, the 911 call by Marshall was used not for the truth of the matter asserted, but rather to corroborate the eyewitness testimony of Clifton, the prosecution's key witness to the murder. On the five- to seven-minute 911 tape, Marshall relayed information offered by Clifton, a minor who could be heard sobbing hysterically in the background. The prosecution relied on the 911 tape to corroborate Clifton's testimony that he had witnessed the shooting and instantly summoned help from neighbors. Because the 911 call was not offered for the truth of the matter asserted, the trial court did not need to reach the excited utterance exception to the hearsay rule.

Defendant also argues that the 911 tape was irrelevant and prejudicial. "No evidence is admissible except relevant evidence." (Evid. Code, § 350.) However, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The 911 call was relevant because it corroborated the testimony of the sole eyewitness to the shooting. In weighing whether the 911 call's prejudicial effects outweighed its probative value, the court explained to the defense: "I think that your case and your argument would be better suited if the scenario were such that your characterization of the circumstances were that your client did not commit the shooting, period. This tends to implicate him in that shooting. There is nothing there going to the issue of manslaughter versus first degree or anything of that nature." To eliminate the possibility of undue prejudice to defendant, the court redacted portions of the call that impugned defendant's general character. Because the 911 call was not relevant to the defense asserted and was carefully redacted, we find no prejudice to defendant and no abuse of discretion in its admission.

In any event, any error by the court in admitting the 911 call would have been harmless, because there was no reasonable probability that defendant would have attained a more favorable result but for the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Autopsy Photograph

At trial, defendant objected to admission of Woods' autopsy photograph under Evidence Code section 352. He claimed images of clumsy stitching on Wood's chest and the metal probe in her wound were more prejudicial than probative. The court overruled the objection explaining the autopsy photograph was only 8 by 11 inches, unlike larger displays the court would otherwise exclude. The court determined the purpose of the probe was to show the path of the bullet's projectile, and was, according to the court, "normal in any type of coroner's testimony." On appeal, defendant argues the admission of the autopsy photograph violated the Due Process Clause and the 14th Amendment, rendering the trial fundamentally unfair. Defendant also asserts its admission was irrelevant and more prejudicial than probative.

Again, defendant's failure to raise his constitutional rights to due process and a fair trial in the trial court constitutes a waiver of that claim. (*People v. Catlin, supra,* 26 Cal.4th 81, 122-123, mod. 26 Cal.4th 1060c.) On his remaining claims, we review the trial court's ruling on the admissibility of the autopsy photograph for abuse of discretion. (*Id*. at p. 120.)

"The rules pertaining to the admissibility of photographic evidence are well settled. Only relevant evidence is admissible [citations], and all relevant evidence is admissible, unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence. [Citations.]" (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) Where relevant, victim autopsy photographs are admissible. (*People v. Welch* (1999) 20 Cal.4th 701, 750-751; *People v. Spears* (1991) 228 Cal.App.3d 1, 28-29.)

It is undisputed Woods died from a gunshot wound to her chest inflicted by defendant. The crucial issue at trial was whether defendant had the requisite intent to kill her. The challenged autopsy photograph was relevant and more probative than prejudicial in determining the given the disputed issue of intent. Stippling depicted around the wound was relevant to show defendant shot Woods from a half of an inch to 24 inches at a 45 degree angle. The metal probe depicted the location of her wound and the trajectory of the bullet as it passed through Woods' chest, lungs and aorta. The photograph further corroborated the deputy coroner's testimony at trial. The degree, extent, and cause of the damage were the crucial forensic evidence on the disputed trial issue of defendant's intent to kill.

Defendant's analogy to the autopsy photographs in *People v. Marsh* (1985) 175 Cal.App.3d 987 is inapposite. There, the prosecution enlarged and projected onto a screen seven colored autopsy photographs depicting exceptionally gory images that were unnecessary to the resolution of the case. (*Id.* at pp. 996-998.) Here, at 8 by 11 inches, the autopsy photograph was small and no more inflammatory than those normally used. The jury would be "aware that the gruesome nature of the photo in question was more of a result of routine autopsy procedures than a direct product of defendant's [actions]." (*People v. Medina* (1995) 11 Cal.4th 694, 755.)

Even if admission of the autopsy photograph had been erroneous, any error would have been harmless, because there was no reasonable probability that defendant would have attained a more favorable result but for the error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

III. CUMULATIVE ERROR

Defendant argues that the cumulative effect of the alleged errors deprived him of his constitutional right to due process. We disagree. There has been no showing of cumulative prejudicial error. (*People v. Noguera* (1992) 4 Cal.4th 599, 649; see also *People v. Seaton* (2001) 26 Cal.4th 598, 674; *People v. Cudjo* (1993) 6 Cal.4th 585, 630 [no cumulative error when the few errors which occurred during the trial were

inconsequential].) Whether considered individually or for their cumulative effect, none of the errors alleged affected the process or accrued to defendant's detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Cudjo*, *supra*, 6 Cal.4th at p. 637.) As the Supreme Court has held "[a] defendant is entitled to a fair trial, not a perfect one." (*People v. Mincey* (1992) 2 Cal.4th 408, 454; *People v. Miranda* (1987) 44 Cal.3d 57, 123.) In this case, defendant received more than a fair trial.

IV. SENTENCING

A. Section 12022.53, Subdivision (d), Enhancement

The trial court denied defendant's sentencing motion to strike the gun use enhancement under section 12022.53, subdivision (d). On appeal, defendant maintains his 25-year-to-life sentence should have been stricken because section 12022.53, subdivision (d), does not rationally serve a legitimate state interest and treats him differently than other similarly situated offenders, thus denying him constitutional due process and equal protection under the United States and California Constitutions. We disagree.

This enhancement is the result of a policy choice by the Legislature. The enactment of section 12022.53 reveals the Legislature clearly determined that the use of firearms in commission of the designated felonies is such a danger that, "'substantially longer prison sentences must be imposed . . . in order to protect our citizens and to deter violent crime.'" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 497; see *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1231; *People v. Perez* (2001) 86 Cal.App.4th 675, 680.) The Supreme Court has held valid penalty enhancements to the base sentence term for a crime as the trial court retains flexibility in fixing the sentence for the underlying crime. (*People v. Martinez, supra,* 76 Cal.App.4th at p. 495.) Section 12022.53 is rationally related to and supports the Legislature's legitimate state interests in citizen safety and deterrence of violent crimes. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 828-830.) Defendant's contentions have also been generally rejected by numerous Courts of Appeal. (*People v. Taylor* (2001) 93 Cal.App.4th 318, 323 324; *People v.*

Alvarez (2001) 88 Cal.App.4th 1110, 1118; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212, 1216; and *People v. Perez* (2001) 86 Cal.App.4th 675, 678, 680.) Accordingly, defendant's due process claim is rejected.

The guarantee of equal protection under the state and federal constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a)) is violated only when the state adopts a classification that treats similarly situated persons in an unequal manner. (*People v. Alvarez, supra,* 88 Cal.App.4th at p. 1114.) A statute satisfies the requirements for equal protection if it bears a rational relationship to a legitimate state purpose. (*People v. Gonzales* (2001) 87 Cal.App.4th 1.) However, "[i]t is well established that the Legislature may single out a particular threat to society and punish it as a separate category from other types of threats." (*People v. Edwards* (1991) 235 Cal.App.3d 1700, 1709.)

Defendant makes no showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. He is not similarly situated to other murderers who choose less dangerous weapons to kill another. "A firearm is particularly lethal to the victim of the underlying crime as well as others in the vicinity; and a firearm allows the perpetrator to effortlessly and instantaneously execute an intent to kill once it is formed. [Citation.] A criminal's decision to discharge a gun to kill another person is certainly an appropriate factor in determining the length of punishment." (*People v. Zepeda, supra,* 87 Cal.App.4th at p. 1215.) Even were this not so, however, any disparate treatment under the statute would be rationally related to a legitimate governmental purpose. (*People v. Taylor, supra*, 93 Cal.App.4th at pp. 322-323.) Therefore, defendant's claim of an equal protection violation also fails.

B. Section 12022.53, Subdivisions (b) and (c), Enhancements

At sentencing, the trial court imposed a 25-year-to-life term for the firearm enhancement under section 12022.53, subdivision (d). On the same count, the court also imposed a 10-year term under subdivision (b) and a 20-year term under subdivision (c) of section 12022.53. The trial court ordered the additional enhancements stayed pursuant to

section 654.[3] On appeal, defendant asserts the terms imposed under subdivisions (b) and (c) of section 12022.53 must be stricken.

At issue are two conflicting subdivisions regarding imposition of enhancements under Section 12022.53. On the one hand, subdivision (f) of that section provides: "*Only one additional term of imprisonment under this section shall be imposed per person for each crime.* If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. An enhancement involving a firearm specified in Section 12021.5, 12022, 12022.3, 12022.4, 12022.5, or 12022.55 shall not be imposed on a person in addition to an enhancement imposed pursuant to this section. An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)." (§ 12022.53, subd. (f), emphasis added.) On the other hand, subdivision (h) of section 12022.53 provides: "Notwithstanding Section 1385 or any other provision of law, *the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section*." (§ 12022.53, subd. (h), emphasis added.)

1. People v. Bracamonte and People v. Oates

In *People v. Bracamonte* (2003) 106 Cal.App.4th 704 (review den. May 14, 2003) (*Bracamonte*), Division Four of this District attempted to harmonize the conflicting language in subdivisions (f) and (h) of section 12022.53. There, a defendant convicted of murder was found to have personally and intentionally discharged a firearm which inflicted great bodily injury or death (former §§ 12022.5, subd. (a)(1); 12022.53, subds. (b)-(d)). (*Bracamonte, supra,* 106 Cal.App.4th at p. 706.) The defendant was sentenced

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[3] Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

on one count to life without the possibility for parole, plus 25 years to life on the firearm discharge and use enhancement. (*Ibid.*) The trial court also imposed and stayed certain firearm discharge and use enhancements. (*Ibid.*)

With regard to section 12022.5, the *Bracamonte* court followed the "plain and clear language that a section 12022.5 firearm use enhancement 'shall not be imposed . . . in addition to an enhancement imposed pursuant to . . . section [12022.53].' (§ 12022.53, subd. (f).)" (*Id.* at p. 712, fn. 5.) "Such directive is mandatory. No discretion is involved. [Citations.]" (*Ibid.*) In accord with the language of section 12022.53, subdivision (f), and earlier authority, the court concluded that the "better rule" is that these enhancements must be stricken. (*Id.* at p. 711, citing *People v. Eberhardt* (1986) 186 Cal.App.3d 1112, 1114-1115, 1121-1124; in accord *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1153 [where the section 667, subdivision (a), and section 667.5, subdivision (b), enhancements arise from the same conviction, only the greater applies, and the proper remedy is to strike the section 667.5 enhancement]; *People v. Haykel* (2002) 96 Cal.App.4th 146, 151 [enhancement imposed or stricken, not stayed]; *People v. Jones* (1992) 8 Cal.App.4th 756, 758 [enhancements stricken]; contra, *People v. Vergara* (1991) 230 Cal.App.3d 1564, 1568-1569 [permanent staying of enhancement equivalent to striking enhancement].)

On section 12022.53 enhancements, however, *Bracamonte* reached a different conclusion. Given the conflict between the provisions of subdivisions (f) and (h), the *Bracamonte* court concluded "section 12022.53 operates to require the trial court to add the applicable enhancement for each firearm discharge and use allegation under that section found true and then to stay the execution of all such enhancements except for the one which provides the longest imprisonment term." (*Bracamonte, supra,* 106 Cal.App.4th at p. 713.)

In *People v. Oates* (2004) 32 Cal.4th 1048, 1055 (*Oates*), the Supreme Court addressed the situation in which a single victim was physically harmed in a crime of violence against multiple victims, and held that section 12022.53 enhancement is allowed

for each separate offense for which the enhancement was found true. *Oates* acknowledged the complexity of applying enhancements from the charging stage to verdict. (*Id.* at pp. 1058-1059.) Although *Oates* did not explicitly discuss whether duplicative section 12022.53 enhancements on the same count should be stricken or stayed, the Supreme Court left undisturbed the Court of Appeal's interpretation that such enhancements should be stricken. (*Id.* at p. 1069.)

2. Legislative Construction

The ambiguous statutory language in subdivisions (f) and (h) of section 12022.53 and the concerns expressed by *Oates* compel us to reexamine the holding under *Bracamonte*. In construing an ambiguous statute, "courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] 'We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*People v. Coronado* (1995) 12 Cal.4th 145, 151.) A statement of legislative findings and declarations generally has relevance to legislative intent. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 15.) "'[L]egislative intent is not gleaned solely from the preamble of a statute; it is gleaned from the statute as a whole, which includes the particular directives.' [Citation.]" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1118.) In addition, "[w]e may properly look to the legislative history of an enactment, including legislative committee reports and other legislative records, as an aid to ascertaining the Legislature's intent. [Citations.]" (*In re Rottanak K.* (1995) 37 Cal.App.4th 260, 267, fn. 8.)

We examine the relevant legislative history of section 12022.53 from 1997 to 2003.[4] Originally enacted in 1997 (Stats. 1997, ch. 503, § 1), a primary purpose of

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[4] Because the offense occurred in January 2002, the applicable period is 2002 and any legislation enacted then or subsequently would not ordinarily apply. Therefore, our

section 12022.53 was to "provide[ ] that the court must impose the greatest applicable enhancements, and [to] further provide[ ] that *specified enhancements, for using or being armed with a gun, shall not be imposed in addition to the expanded enhancements*." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 4 (1997-1998 Reg. Sess.) as amended Apr. 9, 1997, p. 1, par. 4, emphasis added.)

Legislation in 1998 amended several related sections of the Penal Code, including section 12022.53. (Stats. 1998, ch. 925, § 5.5.) The 1998 statute explained that "[*i*]*n enacting subdivision (f), the Legislature intended to preclude multiple enhancements for the infliction of great bodily injury on one victim for one crime when an enhancement was imposed under subdivision (d) of Section 12022.53*. The Legislature did not intend to preclude the imposition of an enhancement for the infliction of great bodily injury under Section 12022.7, 12022.8, or 12022.9 in addition to the imposition of an enhancement for the use or discharge of a firearm under subdivision (b) or (c) of section 12022.53 when the great bodily injury was not caused by discharging the firearm." (Stats. 1998, ch. 925, § 10.2, emphasis added.) Nothing in the 1998 statute interpreted subdivision (h) of section 12022.53 to mean that a court may not strike the allegations under that section that are rendered superfluous by the required imposition of the enhancement that provides the longest term.

Moreover, the Assembly Committee on Public Safety stated in the disjunctive that the 1998 legislation amending section 12022.53 "[p]rovides a sentence enhancement of 10, 20, *or* life imprisonment where a person personally uses a firearm to commit various felonies. . . ." (Assem. Com. on Pub. Safety, Analysis of Assem. Bill No. 1290 (1997-1998 Reg. Sess.) as amended Jan. 13, 1998, p. 3, par. 1, emphasis added.) The plain use of the disjunctive by the Assembly Committee on Public Safety confirms the Legislature intended courts to apply only one enhancement: "10 years"

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review of 2002 and 2003 legislative history is limited only to construing consistent language under a companion statute, section 12022.5.

(§ 12022.53, subd. (b)); "20 years" (§ 12022.53, subd. (c)); *or* "25 years to life" (§ 12022.53, subd. (d)).

In 2002, among other purposes, the Legislature enacted new legislation to: "*make the language of enhancement statutes uniform and consistent*. . . ." (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 2173 (2001-2002 Reg. Sess.) as amended Jun. 4, 2002, 1998, p. B, par. 2, emphasis added.) The 2002 amendments "eliminate[d] certain enhancements where other provisions of law provide for duplicate or more severe enhancements" under sections 1170.1, 12022.5, 12022.53, 12022.55, 12022.7 and 12022.9. (Legis. Counsel's Dig., Stats. 2002, ch. 126, p. 1.) The 2002 legislation simplified the language in section 12022.53, but left unchanged subdivisions (f) and (h). The 2002 legislation also added to section 12022.5, a companion statute on terms of imprisonment for use of firearms, nearly identical language contained in section 12022.53, subdivision (h). The new provision provided: "Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Stats. 2002, ch. 126, § 3; former § 12022.5, subd. (c).)[5]

Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.) We are not compelled to give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended. (*People v. Ledesma* (1997) 16 Cal.4th 90, 95.) It would defy common sense for the Legislature to intend different treatment of two nearly identical statutory provisions.

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[5] Amendments in 2000 and 2001 to section 12022.53 made only technical revisions and nonsubstantive changes. (Stats. 2000, ch. 287, § 30; Stats. 2001, ch. 854, § 60.) The 2003 amendment to section 12022.5, subdivision (c), was nonsubstantive, substituting "provision of law" with "provisions of law." (Stats. 2003, ch. 468, § 21.)

In construing the Penal Code, "[a]ll its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." (§ 4.) Our review of legislative history shows the Legislature instructed trial courts on the manner of applying enhancements under section 12022.53. Further, in an effort to "make the language of enhancement statutes uniform and consistent," the Legislature patterned subdivision (c) of section 12022.5 after subdivision (h) of section 12022.53. The Legislature is presumed to have meant what it said, and the plain meaning of the language governs. (*People v. Coronado, supra,* 12 Cal.4th 145, 151.) It follows, then, that the Legislature intended the nearly identical language in sections 12022.53 and 12022.5 to have the same meaning.

A fair reading of section 12022.53, subdivisions (f) and (h), leads to a result consistent with that legislative intent. Applying subdivision (f), the court must choose the section 12022.53 enhancement to be imposed, that providing the longest term of enhancement. Once that determination has been made, that enhancement, but only that enhancement, must be imposed. Thereafter the trial court may not strike that single applicable enhancement, as to do otherwise would violate subdivision (h). None of the other enhancements may be imposed at all; nor may the other listed enhancements under separate statutory provisions. Only if they are improperly imposed by the trial court need they be stricken by a reviewing court.[6] This construction is further in harmony with legislative intent to eliminate certain enhancements where other provisions of law provide for duplicate or more severe enhancements.

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[6] Under this legislative requirement, the finding of an enhancement is not stricken. The court may not disregard that finding, but instead should place a statement of reasons on the record, indicating its compliance with the legislative direction to impose only one enhancement. (*People v. Ledesma, supra,* 16 Cal.4th at pp. 99-100.) While there is little practical distinction between this procedure and imposing, and then striking, a superfluous or inapplicable enhancement, because the Legislature directed that these enhancements not be imposed at all, we believe this procedure is more consistent with that intent.

Consistent with our conclusion, then, we find the trial court imposed inapplicable enhancements under section 12022.53, subdivisions (b) and (c) and improperly stayed these enhancements under section 654. Accordingly, we order the inapplicable enhancements stricken.

DISPOSITION

We reverse that part of the judgment imposing and staying the terms for the surplus or inapplicable enhancements described in section 12022.53, subdivision (f); here, sections 12022.53, subdivisions (b) and (c). In lieu thereof, the imposition of the enhancements for the use and discharge of a firearm enhancements imposed pursuant to section 12022.53, subdivisions (b) and (c) are stricken. As modified, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

ZELON, J.

We concur:

PERLUSS, P. J.

JOHNSON, J.